

Virendra Vs. State of U.P.

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Court : Allahabad

Decided On : Jan-27-2000

Reported in : 2000CriLJ3917

Judge : S.K. Agarwal, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 307

Appeal No. : Criminal Jail Appeal No. 384 of 1997

Appellant : Virendra

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Raghuraj Kishore, Adv.

Disposition : Appeal allowed

Judgement :

ORDER

S.K. Agarwal, J.

1. This criminal appeal is preferred by appellant, Virendra against his conviction under Section 307, I.P.C. and consequent sentence of 5 years' R.I. and a fine of Rs. 2,000/-. In default of payment of fine 6 months' further R.I. was imposed on

him by the judgment and order dated 16-8-1996 passed by the VII Additional Sessions Judge, Agra, Sri A. A. Siddiqui.

2. Heard Sri Raghuraj Kishore, who has been appointed as amicus curie, and the learned A.G.A. for the State.

3. The case of the prosecution, as set out in the F.I.R., is that on 10-8-1994 at about 9.30 in the night when the brother of the informant, Mahendra Pratap, was in the hotel of Phattoo for taking his food, a wordy dual between the appellant and Mahendra Pratap ensued. Abuses were also exchanged and when the victim, Mahendra Pratap, asked the appellant to desist from hurling abuses, the appellant is said to have whisked out a knife from his pocket and started assaulting him. The first knife blow was received by Mahendra Pratap on his palm. The subsequent blows were given in abdomen and the hand. The alarm raised attracted to the spot Baby, Suresh, Mahesh Chandra, and Vinod Kumar, who not only witnessed the incident but also saved the victim from any further assault. The victim was admitted in S. N. Hospital, Agra, where he was provided treatment. The F.I.R. of the occurrence was lodged by Chandra Mohan Sharma, brother of victim Mahendra Pratap, on the same night at about 0.15 a.m., i.e. within 2 hours and 45 minutes of the occurrence.

4. The victim, Mahendra Pratap, was medically examined by P.W. 4 Dr. R. S. Chahar, at the hospital at about 10.30 P.M. on 10-8-1994. Four injuries, including 3 stab-wounds on the abdomen and chest were found. Only one injury was an incised wound on the inner part of the left hand. The record does not show presence of any supplementary report though the injuries were kept under observation. It appears that the victim was not subjected to any X-ray examination. The injuries, specially one on the abdomen, suggests clearly protruding of intestines, hence no further probing was made by the doctor conducting the medical examination. Similarly, injuries No. 2 and 3 were on the chest, but no probing was done by the doctor in these injuries. According to his opinion, as recorded in the injury report, injuries Nos. 1 and 3 were caused by pointed sharp object, while injury No. 4 was caused by sharp-edged object. Injuries Nos. 1 and 3 were kept under observation, whereas injury No. 4 was found to be simple. The

doctor has admitted in cross-examination that no supplementary report, as earlier stated, was prepared by him. No other evidence has been brought on record by the prosecution to establish that the victim underwent any surgical process for repairing any damage to the omentum, nor there is any evidence to show that any internal damage underneath injuries No. 1 to 3 was detected at any stage of the treatment. Thus, this Court has to assess the gravity of the offence only from the medical examination report.

5. The prosecution, in order to establish its case, has examined as many as 5 witnesses. Out of them, P.W. 1 and P.W. 2 are the ocular witnesses supporting the case of the prosecution. Both of them are brothers. One had lodged the F.I.R. and the other is the victim of the incident. P.W. 3 Tika Ram Vashishta has proved the chick F.I.R. and other papers pertaining to the registration of the case. P.W. 4 is the Medical Officer, who has initially examining the victim. P.W. 5 V. D. Sharma is the Investigating Officer.

6. The defence has denied the allegations levelled by the prosecution against it. The case set up by the appellant, in defence, is that he has been falsely involved and no incident occurred between him and the injured. The witnesses are deposing falsely.

7. The defence has brought on record the dying declaration of the victim, which was recorded on 12-8-1994 at 5.10 P. M. by Sri R. A. Gupta Additional City Magistrate III, Agra. He has been examined by the defence as D.W. 1 to prove this dying declaration. It will be pertinent to reproduce the dying declaration in the judgment. The dying declaration runs as under :-

'Stated on oath' that on 10-8-1994, Wednesday, at about 10.00 P. M. in the night I came back from my shop and left the key at my house. A boy called me to the place of occurrence. I do not know his actual name but otherwise he is called Gutargoon. I know him from his face. He took me to the hotel of Phattoo Rotiwala. He kept me engaged there in conversation. He attacked me with knife. Some others were also there with him. I do not know them. After receiving the injuries I ran out from the hotel and fell down near old Chungi. I raised alarm for my safety. Thereafter I was carried to the hospital.

The version contained in the dying declaration, thus, is running completely against the version given out by his own brother in the F.I.R., which was lodged at P.S. Shahganj, Agra, at about 0.15 hours on 11-8-1994, that means during the intervening night. The dying declaration does not give out the actual name of his assailant. It gives out only his alias. No doubt the place of occurrence is settled as hotel of Phattoo Rotiwala, but dying declaration does not say that he had gone there to take his meal. On the contrary, the dying declaration indicates that he was taken there by a boy, known by the name Gutargoon.

8. In his statement the victim nowhere stated that this Gutargoon, who had assaulted him, according to the dying declaration, also bears the name Virendra Kumar, the appellant. In the absence of any such assertion in the statement of this witness, Virendra Kumar, the appellant, is not connected in any manner with Gutargoon, who had brought him from his house to hotel and assaulted him there.

9. No doubt the witness has not been given any suggestion that he has given a different statement in the dying declaration, but the defence has produced D.W. 1 to prove his dying declaration and the prosecution had no courage to challenge the dying declaration either as false or not made by the witnesses. In such a situation it will be a travesty of justice if it is not accepted by the court as true and genuine and made by the victim to the S.D.M. who is a responsible public servant.

10. It is the duty of the prosecution to come up before the Court with clean hands without any artistry, innovation or suppression of facts. Once we acknowledge and accept this dying declaration, the prosecution appears to have come up before the Court with a version which is not only ingenious but clearly embellished one. The dying declaration does not name the brother or any other witnesses therein. The injured did not say who arrived in response to his alarm at the place of occurrence. He also did not say who took him to the hospital. Once examine the injury memo, Ext. Ka-5 find that he was admitted in the hospital by one Mahesh Chandra Sharma son of Prem Narain Sharma. The evidence of the prosecution is that the victim was brought to the hospital by Chandra Mohan Sharma, Suresh and Baby, but this is not borne out from the record. Even P. W. 4 the Medical Officer, in his statement, in examination-in-chief has stated that the victim, Mahendra Pratap,

was brought by Mahesh Chandra Sharma. The victim has stated that he and informant are the only brothers.

11. The doctor has not disclosed in the examination-in-chief that injuries were grievous and would have resulted into the death of the victim. On the contrary his statement is that these injuries may have proved dangerous to life. This is no proper compliance of the requirement of the provisions of Section 307, I.P.C.

12. Section 307, I.P.C. requires 'Whoever does any act with such intention or knowledge, and under such circumstances that if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.' Thus, either the intention to kill or knowledge that the act of the offender will result into death of the victim in the case is apparently missing. Absence of any supplementary report is further a blow to the prosecution case with regard to the offence under Section 307, I.P.C. The fact that the dying declaration completely demolishes the prosecution case with regard to the participation in the offence of appellant Virendra as well as the presence of the witnesses. As such, it will not be safe to attach any importance to the F.I.R. version, now being adhered to by the victim as well. The charge against the appellant, in my opinion, is not proved in accordance with the accepted principles and norms of criminal jurisprudence. Non-examination of Fattoo hotelwala or any person whose presence is acknowledged by P.W. 1 and P.W. 2 further renders the prosecution story not only ineffective but also extremely doubtful. Apart from this other witnesses, named in the F.I.R., the prosecution chose not to produce any one of them in trial. Out of such named persons, Suresh and Baby happened to be the friends of the informant and the victim. Yet, their non-appearance raised a serious doubt and inflicts a telling blow to the authenticity and correctness of the prosecution story as disclosed in F.I.R. and adhered to subsequently in Court by injured also.

13. The presence of P.W. 1, at the time of assault, becomes highly doubtful when we scrutinise the testimony of P.Ws. 1 and 2 itself. P.W. 2 stated in cross-examination that his brother enquired from him the name of the assailant as Virendra Kumar in the hospital. He stated that brother had seen him smeared in blood only. He did not know on which parts of the body he suffered injuries. When his brother came to the spot, he was already lying on the ground. P.W. 1 also states that when he reached the spot, his brother, victim was pressing his injuries by his hands. The presence of informant at the spot is further belied by another fact i.e. the injured was taken to hospital by a third person other than P.W. 1.

14. Before parting finally with this judgment I would like to comment upon the conduct of the Investigating Officer as well. A young man was subjected to incarceration for a long period of five years by the prosecution on the basis of evidence based on suppression of true facts. It is not only unbelievable but also wholly unacceptable that the prosecution was in complete dark about the dying declaration. Normally, a dying declaration is recorded always on the basis of an information communicated by the Medical Officer concerned to the police and the police makes possible the recording of the dying declaration. The circumstances unerringly point that the investigating agency deliberately, by design, kept the dying declaration a secret and prosecuted the appellant on a wholly false version. It made no attempt, even after it was brought to light by accused, to show by relevant and cogent evidence that the appellant is also known as Gutargoon. This adversely reflects upon the honesty and integrity of investigating agency, the I.O., and indicates that deliberately it was suppressed by the prosecution so as to support the version contained in the F.I.R. and procure conviction of a poor young man. He was robbed of 5 precious years of his life.

15. In my opinion, it shall be proper to recommend his case for compensation to the Government, which shall consider the case and award the appellant adequate and proper compensation, taking into consideration the circumstances discussed in this judgment. The amount of compensation must not fall below a sum of Rs. 40,000/- in any case. A copy of this judgment shall be sent immediately to the Home Secretary for necessary compliance of the recommendations made in this judgment. The Government may recover this amount from the delinquent official

after holding a proper inquiry into his conduct. The Government shall be under an obligation to report back to this Court the action taken in compliance of the direction made in the judgment.

16. In view of the discussions made above, this appeal is allowed. The judgment and order dated 16-8-1996 passed by the learned VII Additional Sessions Judge, Agra, convicting and sentencing the appellant, is hereby set aside. The appellant is acquitted of the offence charged with. In case he is still in jail he shall be released forthwith.

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